88-5

No. 87-

IN THE

Supreme Court of the United States

October Term, 1987

GERARD W. McCALL,
Petitioner,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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June 30, 1988

QUESTION PRESENTED

Does arbitration pursuant to § 153 Second of the Railway Labor Act preempt state handicap discrimination claims which do not involve interpretation of the collective bargaining agreement?

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CHESAPEAKE & OHIO RAILWAY COMPANY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Gerard W. McCall respectfully prays that a writ of certiorari issue to review the judgment opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 4, 1988.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Michigan, Southern Division, denying Respondent's Motion to Dismiss was not reported, but is reproduced in the Appendix. The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Sixth Circuit was issued on April 4, 1988. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT

A. Facts.

Petitioner Gerard W. McCall was hired by Chesapeake & Ohio Railway Company (hereinafter referred to as C&O) as a locomotive fireman in 1956. From 1967 until June 13, 1983, Mr. McCall worked for C&O as a locomotive engineer. (Trial transcript, hereinafter referred to as Tran., Vol. III, pp. 5-6, 18.) Petitioner was first diagnosed as a diabetic in 1969. From 1969 until January, 1982, Petitioner's adult-onset diabetes was treated with the use of oral hypoglycemic agents. In 1982, because he was experiencing leg cramps, Petitioner was hospitalized to convert to the use of insulin to control his diabetes. After conversion to insulin,

Mr. McCall returned to work with a slip indicating he had undergone conversion to insulin and could return to work as of February 8, 1982 (Hailer Dep. Tran. - 5, Plaintiff's trial exhibit No. 3).

After conversion to insulin, Mr. McCall continued to work as an engineer for almost 18 months. On May 27, 1983, Petitioner underwent his required semi-annual physical examination for the railroad. At that time, the railroad medical office noted that Mr. McCall was taking insulin for the control of his diabetes. On June 13, 1983, Mr. McCall was removed from service ostensibly because his diabetes was controlled by the use of insulin (Tran. Vol. III, p. 18). Respondent claimed that Petitioner was removed from his job as an engineer because company policy prohibited employees who took insulin from working in locomotive engine service. The railroad's policy was a blanket exclusion of all insulin-taking diabetics and did not allow for individual consideration. (Plaintiff's trial exhibit No. 7.) However, at the time the policy was instituted, the Respondent "grandfathered" employees who were already working and using insulin to control their diabetes.

On September 1, 1983, Petitioner's union representative requested that Petitioner be permitted to exercise his seniority and to return to work as a fireman on the railroad. This request was pursuant to a provision in the collective bargaining agreement which allowed an employee who was medically disqualified as an engineer to return to work as a fireman. Also on September 1, 1983, Petitioner's

union representative requested the appointment of a three doctor panel to consider Petitioner's removal from service pursuant to the collective bargaining agreement. This panel was provided for under the minor dispute resolution provisions of the Railway Labor Act, 45 U.S.C. § 153 Second. The three doctor panel upheld the C&O policy and ruled 2-1 that Petitioner was disqualified from continuing work as an engineer or a fireman. (Plaintiff's trial exhibits No. 2, Defendant's exhibit No. 7.)

B. Proceedings Below.

Petitioner then brought an action in the local state court, alleging that C&O's blanket rule disqualifying him from working as a result of taking insulin to control his diabetes violated the protections of the Michigan Handicappers' Civil Rights Act (MHCRA), Mich. Comp. Laws Ann. § 37.1101 *et seq.* (1985). The state court action was removed to the Federal District Court for the Eastern District of Michigan, Southern Division, on the grounds of diversity.

While the action was pending before the District Court, C&O filed a motion contending that Petitioner's state court action pursuant to the Michigan Handicappers' Civil Rights Act was preempted by the Railway Labor Act. The district court denied the motion. (See reproduced transcript of the District Court's Opinion, Appendix pp. 1a-3a.)

The case proceeded to a jury trial which found in favor of Petitioner and awarded him damages in the

amount of $328,000.00. The judgment in favor of Petitioner was vacated by the Sixth Circuit Court of Appeals with instructions to dismiss. The Sixth Circuit held that Michigan's Handicappers' Civil Rights Act required the jury to make the identical decision made by the three doctor panel established pursuant to § 153 of the Railway Labor Act and, therefore, was preempted by that Act. (See copy of the Sixth Circuit Opinion attached in the Appendix, pp. 4a-23a.)

REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT OPINION SEVERELY RESTRICTS THE RIGHTS OF STATES TO ENFORCE HANDICAP DISCRIMINATION LAWS ON BEHALF OF ALL OF ITS CITIZENS

The Sixth Circuit opinion improperly restricts the States' ability to protect all of its citizens from handicap discrimination. If allowed to stand, the opinion below could affect millions of workers who have arbitration remedies available through a collective bargaining agreement. The Sixth Circuit opinion violates established precedent of this Court which allows independent statutory rights to be vindicated in the courts, despite the availability of arbitration procedures pursuant to collective bargaining agreements.

A. The Railway Labor Act

The Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, was originally passed by Congress in 1926 to pre-

vent interruption in interstate commerce by strikes and other labor-management disputes. It provides a mechanism for the resolution of "minor" disputes between railroads and their employees. Section 151 of the Act indicates that it was enacted to". . . Provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions." With regard to such "minor" disputes, the Act establishes an exclusive mechanism for the arbitration of disputes regarding interpretation or application of the collective bargaining agreement. *Terminal Railroad Ass'n v. Trainmen,* 318 U.S. 1, (1943).

Several decisions of this Court have clearly indicated that the RLA does not preempt all state law which may affect railroad employees. In *Terminal Railroad Ass'n v. Trainmen, supra,* this Court was asked to decide whether the State of Illinois could enforce a law requiring railroads to provide cabooses on all trains operated within Illinois state boundaries. The state claimed the cabooses were necessary to protect the health and safety of the workers at the end of the train. In analyzing whether the Illinois regulation was preempted, this Court stated at 318 U.S. 7:

> But it cannot be that the minimum requirements laid down by state authority are all set aside. We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves and did not preclude the State of Illinois from making the order in question.

> Furthermore, it is equally clear that Congress did not intend to preempt discrimination law by enacting the RLA in 1926. Discrimination is not mentioned anywhere in the Act, and there is no explicit provision providing for the preemption of state law in the field on railway working conditions. Given that preemption is not explicit in the Act, our analysis must proceed to whether preemption may be implied under the circumstances.

In cases of preemption, "the ultimate touchstone" is Congressional intent. *Allis-Chalmers v Lueck*, 471 U.S. 202 (1985). Given the respect due to the states in our federal system, there is a strong presumption against finding Congressional intent to preempt state laws. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981).

In *Colorado Anti-Discrimination Comm'n v. Continental Airlines*, 372 U.S. 714 (1963), the petitioner sued Continental Airlines, alleging that it had violated the state discrimination law against racial bias in hiring. As in the instant case, the airline alleged that the Colorado Anti-Discrimination Act was preempted by the RLA.

The Court rejected this argument, holding that the Railway Labor Act did not preempt Colorado's Anti-Discrimination Act. This Court stated at 372 U.S. 724:

> There is even less reason to say that Congress, in passing the Railway Labor Act, and making certain of its provisions

> applicable to air carriers, intended to bar States from protecting employees from racial discrimination. No provision in the act even mentions discrimination in hiring. . . . Nothing in the Railway Labor Act or in our cases suggest that the Act places upon an air carrier a duty to engage only in fair nondiscriminatory hiring practices. The Act has never been used for that purpose, and we cannot hold that it bars Colorado's Anti-Discrimination Act.

In *Atchison, Topeka & S. F. Ry. v. Buell*, 480 U.S. ____ (1987), this Court held that conduct subject to arbitration under the RLA did not deprive a railroad employee of his right to bring a separate Federal Employers' Liability Act (FELA) action for damages. In rejecting the railroad's argument, this Court stated, at 480 U.S. ____:

> The fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring a FELA action for damages.

> This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. See *e.g., McDonald v. West Branch*, 466 U.S. 284 (1984);

> *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.' *Barrentine, supra,* at 737.

Therefore, the legislative history, the statute itself, and the cases interpreting the RLA all point to a conclusion that the Act cannot preempt state statutes which provide independent substantive state law rights to employees.

B. The Important State Interests Involved

By holding that Michigan's handicap discrimination law is preempted by the Railway Labor Act, the Sixth Circuit sets a dangerous precedent which could jeopardize important states' rights in the area of enforcing state handicap discrimination laws on behalf of all employees, whether or not the employee has a potential arbitration remedy.

Michigan's Handicappers' Civil Rights Act (MHCRA), Mich. Comp. Laws Ann. § 37.1101 *et seq.* was passed by the Michigan legislature and signed into law in

1976. In *Carr v. General Motors Corp.*, 425 Mich. 313, 389 N.W.2d 686 (1986), the Michigan Supreme Court described the legislative intent; at 425 Mich. 319, 389 N.W.2d 688, as follows:

> 'Although Michigan law offers protection in most situations from discrimination based on race, color, religion, national origin, and sex, and in some situations from discrimination based on age and marital status, existing law offers handicappers (sic, less?) than for others. Traditional attitudes often work against handicappers even though the are perfectly capable of performing the jobs for which they apply'. . . .
>
> The bill essentially spells out the above areas of civil rights, now guaranteed to all, and applies the with equal force under the law to this new category. Handicap persons wish to be, and, when the legislation is enacted into law, must be judged and accepted based on their ability.

MHCRA, as is the case with the handicap civil rights legislation of many other states, was patterned after the Rehabilitation Act of 1973, 29 U.S.C. 794 (1973). Section 504 of the Rehabilitation Act prohibits handicap discrimination under any program or activity receiving financial assistance, or under any program or activity conducted by any executive agency or by the U.S. Postal Service.

By making the provisions of the Act applicable only to recipients of federal contracts and other agencies, Congress clearly left to the states the freedom to adopt handicap discrimination laws which suited local public policy. Recognizing the limited application of the Rehabilitation Act of 1973, and concerned with protecting the rights of handicap persons, 49 states and the District of Columbia have passed laws which protect employees from various forms of handicap discrimination.[1]

The application of these state handicap discrimination laws to all workers in each state is in jeopardy. If the preemptive effect of the RLA on state handicap discrimination law is followed under statutes such as the National Labor Relations Act (NLRA) 29 U.S.C. §151 *et seq.*, and § 301 of the Labor Management Relations Act, (LMRA) 29 U.S.C. § 185(a), any employee subject to a collective bargaining agreement which has a grievance procedure mechanism could be prevented from vindicating his or her separate and independent state-sponsored right to be free of handicap discrimination.

According to recent statistics published by the U.S. Department of Labor, over 19% of all U.S. workers are represented by unions, representing potentially 19,05l,000 workers who could be deprived of their state court remedies under the reasoning of the decision below. (Current Population Survey 1987, U.S. Census Bureau and Bureau of Labor Statistics.) Therefore, by granting the writ of certiorari in the instant case, this Court will decide whether state handicap discrimination laws apply to 19 million individual workers.

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1 See Vol. 45A, American Jurisprudence Second § 124, pp. 176-177 for a list of state statutes protecting handicapped workers from discrimination.

C. The Opinion of the Sixth Circuit Directly Conflicts With Several Decisions of This Court

In holding that Petitioner's state law remedy frustrated the purpose of the RLA, the Court below held:

> We simply hold that when an arbitration board established pursuant to § 153 Second is required by the collective bargaining agreement to make the same factual inquiry regarding physical ability to perform a job as would be made under the state act, the federal dispute resolution process is the sole remedy. (Sixth Circuit Opinion, Appendix p. 21a.)

In other words, the opinion below held that because Petitioner had pursued his rights under the collective bargaining agreement for the violation of the union contract, he was precluded from pursuing whatever remedy he had pursuant to an independent state right. In *Colorado Anti-Discrimination Comm'n , supra,* this Court held that the RLA did not preempt the Colorado statute prohibiting discrimination in hiring on account of race.

In the opinion below, *Colorado Anti-Discrimination* was distinguished by the bald assertion that handicap discrimination involves different considerations than the issues of race:

> Preempting the state claim in this case does not conflict with *Colorado Anti-Discrimination* because the statute at issue in that case regulated racial discrimination, conduct that is not by any construction a subject for collective bargaining and arbitration. (Appendix p. 19a.)

There is simply no basis in fact or law for distinguishing handicap discrimination from race discrimination. In both race and handicap discrimination an individual is deprived of an employment opportunity because of membership in a particular group or class, without regard to individual qualifications.

The fact that the state statute requires scrutiny of Petitioner's medical qualification for work does not support any distinction between other forms of discrimination. For example, courts routinely scrutinize job qualification provisions asserted by employers to be *bona fide* occupational qualifications in age and sex discrimination cases. See *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985); *Orzel v. Wauwatosa Fire Dept.*, 697 F.2d 745 (7th Cir., 1983); *cert. denied* 464 U.S. 992 (1983); *Weeks v. South Bell Telephone and Telegraph Co.*, 408 F.2d 228 (5th Cir., 1969); *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir., 1971).

This Court has held in a number of cases that independent statutory rights may be litigated despite the existence of a grievance resolution procedure.

Nothing in this line of cases supports the distinction asserted by the Sixth Circuit. *Lingle v. Norge Div. of Magic Chef, Inc.*, No. 87-259 (1988); *McDonald v. West Branch, supra; Barrentine v. Arkansas Best Freight System, Inc., supra; Alexander v. Gardner-Denver, supra; Atchison, Topeka & S.F. Ry. v. Buell, supra.*

The mere fact that the state statute in question pertains to matters which may be the subject of collective bargaining cannot, by itself, support a claim of preemption under the federal labor laws. In *Fort Halifax Packing Co., Inc. v. Coyn*, 482 U.S. _____, (1987) this Court held that a Maine statute requiring employers to provide one time severance payments to employees was not preempted by the Employment Retirement Income Security Act (ERISA) of 1974, nor the National Labor Relations Act (NLRA). In so holding, this Court rejected the argument that minimum substantive labor standards which affect all workers in the state undercuts collective bargaining, quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), at 482 U.S. _____:

> Such regulation provides protection to individual union and non-union workers alike, and thus 'neither encourage(s) nor discourage(s) the collective bargaining processes that are the subject of the NLRA.' *Id.* at 755. Furthermore, preemption should not be lightly inferred in this area, since the establishment of labor standards fall within the traditional

> police power of the state. As a result, held the Court, '(w)hen a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act.' Id. at 757.

Furthermore, if handicap discrimination claims can be preempted by submitting a claim to arbitration, the union could, without breaching its duty of fair representation, waive the employee's independent statutory rights by failing or refusing to arbitrate the dispute. This factor, and several other important differences between arbitration and judicial fact-finding, led this Court to hold that independent statutory rights arising outside of the collective bargaining agreement may be asserted despite the availability of arbitration. See *Alexander v. Gardner-Denver, supra,* at 51-53, 57-59; *Barrentine v. Arkansas; supra,* at 742; *McDonald v. West Branch, supra,* at 291.

The court below also distinguished *Atchison, Topeka & S.F. Ry. v. Buell* on the grounds that the cases cited in *Buell* dealt only with federal statutory rights, not state statutory rights. (See Appendix p. 11a.) This distinction was obliterated by this Court's recent holding in *Lingle v. Norge Div. of Magic Chef, Inc., supra,* when this Court held that a federal-state distinction was irrelevant to the question of premption. *Id.* at _____.

The Sixth Circuit opinion held that the District Court action was preempted because it involved the same factual questions considered by the railroad special board of adjustment. The fact that Petitioner had an independent state law remedy which involved the same factual inquiry as the railway grievance machinery does not preempt or invalidate his state law remedy. As this Court held recently in the case of *Lingle v. Norge Div. of Magic Chef, Inc., supra,* a parallel factual inquiry is not enough to preempt the state cause of action.

If the principles enunciated by this Court in *Lingle* are applicable to RLA preemption, the independent state action can proceed as long as resolution of the state claim does not involve interpretation of the collective bargaining agreement.

The special adjustment board in this case was charged with deciding whether Petitioner was medically qualified to operate a locomotive. The railroad had a policy of excluding any insulin-controlled engineer or fireman from train and engine service. Although this rule was touted as a safety rule, many insulin-requiring workers were exempted from the operation of this rule by the operation of grandfathering provision. As applied to Petitioner, however, this blanket rule precluded any individual consideration of his ability to safely perform his work.

Petitioner's state right to be free from handicap discrimination, pursuant to Mich. Comp. Laws Ann. § 37.1102 *et seq.* is an independent statutory cause

of action which does not necessitate an interpretation of the collective bargaining agreement. In his claim, pursuant to the MHCRA, the Petitioner had the burden of proving: (1) that he suffered from a medical condition which constituted a handicap, and (2) that his handicap was not related to his ability to perform his job. (Jury instructions, Joint Appendix, pp. 40-43.) Mich. Comp. Laws Ann. §§ 37.1103(b); 37.1202(1)(b)(c)(e).

Although both the jury in the state cause of action and the three doctor panel were analyzing the same facts, they involved distinct, different, and independent sources of Petitioner's rights, that is, his collective bargaining agreement and the Michigan Handicappers' Civil Rights Act. As this Court made clear in *Lingle*, a similarity of factual inquiry is not enough to justify preemption.

The jury found, on the basis of the evidence presented to it, that the C&O Railroad had deprived Petitioner of an employment opportunity by classifying him as an insulin-requiring diabetic and thereby refusing to allow him to continue in his job as a railroad engineer or fireman.

The jury was not instructed nor required to interpret any provision of the collective bargaining agreement in reaching its decision. In fact, the jury was instructed of the result of the three doctor panel and was told they could consider that fact in making its decision. The jury obviously gave no evidentiary value to the decision of the panel and found that Petitioner was entitled to damages based on Respondent's violation of the state anti-discrimination law.

To hold that Petitioner's state cause of action was preempted ignores the Congressional purpose evident in the Rehabilitation Act of 1973 and the clear precedents of this Court allowing the states to protect workers from discrimination in the workplace.

Handicap discrimination is a relatively new area of law. This Court should grant review in this case to better define the limits which federal law can impose on state exercise of the police power with respect to handicap discrimination. State handicap discrimination laws should be given the same respect accorded state laws prohibiting other forms of invidious discrimination.

CONCLUSION

For these reasons the petition for writ of certiorari should be granted, or in the alternative, the Sixth Circuit opinion should be summarily reversed and remanded for consideration of this Court's decision in *Lingle v. Norge Div. of Magic Chef, Inc.*

Respectfully submitted,

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June 30, 1988

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GERARD W. MC CALL,

Plaintiff,

-vs-

Civil Action
84-CV-2833DT

CHESAPEAKE & OHIO RAILWAY COMPANY, a Virginia corporation qualified in Michigan,

Defendant.

_____/

Excerpt of proceedings held before the HONORABLE AVERN L. COHN, District Judge, United States District Court, on Monday, October 10, 1984, at 255 United States Courthouse and Federal Building, Detroit, Michigan.

APPEARANCES:

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Appearing on behalf of the Defendant.

Detroit, Michigan
Monday, October 19, 1984

THE COURT: This is a case brought under the Michigan Handicappers Civil Rights Act, Michigan Statutes Annotated 3.550(101) et seq.

Plaintiff is a locomotive engineer. Defendant has discharged him because of his insulin-dependent diabetes and a ruling by a Special Adjustment Board and the Railway Labor Act 45 U.S.C. 151 *et seq.*, that he "should not be permitted to be an engineer/fireman while taking insulin."

Defendant has moved to dismiss, arguing the Federal Pre-emption, particularly the dispute resolution mechanism of the Labor Act and 29 U.S.C. 701 *et seq.* relating to rehabilitation services.

Defendant is wrong.

Judge Stewart Newblatt, in a Memorandum Opinion and Order of July 19, 1984, in Hopson versus Chesapeake & Ohio, 83 CV8230, has explained why there is no pre-emption. There is simply nothing in the Railway Labor Act dealing as it does with dispute resolution of individual grievances of carriers, employees and bargaining agents' complaints to suggest pre-emption of a public law created right.

The lack of pre-emption of the State Anti-Discrimination Laws aptly support this conclusion.

Likewise, there is nothing in the Statute relating to rehabilitation services. Suggesting that it pre-empts the provision of the Michigan Handicappers Civil Rights Act.

On the contrary, the Michigan Handicappers Civil Rights Act confers rights much the same way as the State Anti-Discrimination Laws confer rights. And, while it is not

clear that the principals of Alexander versus Gardner Denver Company, 415 U.S. 35 would apply to the State Law, under the Michigan Handicappers Civil Rights Act, under State Law, until it is shown to the contrary, I will assume that the Law of Michigan is as laid out in Alexander versus Gardner Denver Company.

Accordingly, the Motion to Dismiss is denied.

The Court does observe that the report of the Special Adjustment Board may be admitted as evidence and accorded such weight as the Court deems appropriate. Gardner Denver, super, [sic] U.S. at 60.

Thank you.

No. 86-1462

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GERARD W. McCALL,
Plaintiff-Appellee,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed April 4, 1988

Before: MERRITT, MARTIN and WELLFORD, Circuit Judges.

MERRITT, Circuit Judge. The Chesapeake & Ohio Railway Company appeals a jury verdict awarding $328,000 to plaintiff Gerard W. McCall as damages for a violation of the Michigan Handicappers' Civil Rights Act, Mich. Comp. Laws Ann. § 37.1101 *et seq.* (1985).[1] We hold that the Michi-

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[1]The Handicappers' Act, in relevant part, provides:

(1) An employee shall not:

* * *

gan statute required the jury to make the identical decision made by an arbitration board established pursuant to the Railway Labor Act, 45 U.S.C. § 153 Second (1982),[2] and that therefore the Michigan statute is preempted in this case by the Railway Labor Act. We therefore vacate the decision of the District Court, and remand with instructions to dismiss the case.

(b) Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.

Mich. Comp. Laws Ann. § 37.1202.

[2]Section 153 Second of the Railway Labor Act provides that carriers, systems, or groups of carriers may, acting through their representatives, establish "system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section." These voluntarily established boards may, by agreement, resolve disputes which would otherwise be referable to the National Railroad Adjustment Board, which is established by 45 U.S.C. § 153 First. Because the national board has jurisdiction over disputes involving unions and grievances involving individual employees, "[t]he cases which may be considered by [a voluntarily established board] shall be defined in the agreement establishing it."

The Act provides that a voluntarily established board shall consist of one person designated by the carrier and one person designated by the representatives of the employees. If the two members of the board are "unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board. . . . [A]wards shall be final and binding upon both parties to the dispute. . . . Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board."

I.

Plaintiff-appellee Gerard W. McCall was hired in 1956 by the Chesapeake & Ohio Railway Company (C&O) as a locomotive fireman. In 1961, he was qualified as an engineer. Although he did not begin working as an engineer immediately upon qualification due to lack of seniority, McCall worked regularly as an engineer from 1967 until June 13, 1983.

In 1969, when McCall was approximately 36 years old, he was diagnosed as suffering from adult onset diabetes mellitus. From 1969 until 1982, the diabetes was controlled with the use of oral hypoglycemic agents. By 1982 the effectiveness of the oral medication had lessened. McCall was hospitalized in January 1982 for conversion to treatment by insulin injections. McCall's doctor, Dr. William Hailer, provided him with a return to work slip which specified that McCall had been under his care for diabetes mellitus, conversion to insulin, and hypertension. McCall returned to work on February 8, 1982.

In June 1983, McCall was removed from service because he controlled his diabetes with insulin. (The record does not indicate why C&O was either unaware of or did not act on McCall's status as an insulin-requiring diabetic prior to that date.) McCall was told that C&O policy required that insulin-requiring diabetics not be permitted to drive mobile equipment, work in proximity to dangerous or moving equipment, work at unprotected elevations, or work alone. Because railroad engineers obviously work in close proximity to moving equipment, McCall was removed from service. At the request of the local, the chairman of the Brotherhood of Locomotive Engineers wrote a letter to the railroad requesting that McCall be returned to service. This letter was accompanied by a letter from Dr. Hailer stating his opinion that McCall's diabetes was under control and that McCall could return to work.

Under the collective bargaining agreement, an engineer who was medically disqualified could exercise his seniority to work as a fireman if he was physically qualified to do so. However, the railroad refused to allow McCall to work as a fireman because the same safety considerations were applicable.

Addendum 27 of the collective bargaining agreement provides for the appointment of a three member board to review findings of physical disqualification.[3] The company and the disqualified engineer each select one physician; the third physician is selected by the two other physicians. The agreement provides that the findings of the medical board are final and binding. This dispute resolution structure is the type of voluntary adjustment board provided for by the Railway Labor Act, 45 U.S.C. § 153 Second (1982). A review board was established to review McCall's case; the board ruled 2-1 that McCall could not continue work as an engineer or fireman.

McCall then brought an action in state court alleging that C&O had violated the Michigan Handicappers' Civil Rights Act, Mich. Comp. Laws Ann. § 37.1101 *et seq.* (1985). The action was removed to federal court on diversity grounds. C&O moved to dismiss, asserting that the exclusive remedy available to McCall is the review board provided for in the

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[3]Addendum 27 applies specifically to locomotive engineers. It provides that when a carrier's chief medical examiner finds an engineer to be physically disqualified and the union does not agree that the engineer's condition justifies removal from service, an appeal may be made within 60 days. On appeal, a three member medical board examines the engineer. The board consists of the carrier's chief medical examiner, a physician selected by the union, and a third member agreed upon by the other two physicians. Finally, "[t]he findings and decisions of the majority of this medical board as to the physical fitness of the engineer to continue in service of the carrier shall be final and binding upon the carrier, the engineer, and the Brotherhood of Locomotive Engineers, but this does not mean that a change in physical condition will preclude a re-examination at a later time."

Railway Labor Act. The motion was denied, and the suit went to trial. On March 14, 1986, a jury verdict was returned for McCall. He was awarded $328,000 in damages. After the District Court denied motions for judgment notwithstanding the verdict and for a new trial, C&O appealed.

On appeal, C&O argues that the federal act preempts the state cause of action. In the alternative, C&O argues that the jury verdict on McCall's Handicappers' Act claim should be reversed. Because we hold that the federal act preempts the state claim in this case, we do not reach the jury verdict issue.

II.

C&O argues that this case is controlled by *Stephens v. Norfolk & W. Ry.*, 792 F.2d 576, *amended*, 811 F.2d 286 (6th Cir. 1986). In *Stephens*, a railroad switchman was disqualified from further service with the railroad after two doctors diagnosed him as having degenerative disc disease, a defect which was considered disqualifying by the railroad. The collective bargaining agreement in *Stephens* was similar but not identical to the one in this case. The railroad refused to appoint a full three doctor panel because Stephens' doctor and the railroad's doctor both agreed on the diagnosis, although Stephens' doctor did state that Stephens was fit for work despite his disease. Stephens' union filed a complaint with a board of adjustment, which concluded that the railroad had acted reasonably and within the terms of the collective bargaining agreement in establishing physical standards for its employees. Stephens then filed a complaint in federal court alleging that the railroad had violated the Michigan Handicappers' Act. The district court dismissed his complaint, relying on the exclusive jurisdiction of the National Railroad Adjustment Board and the failure of Stephens to state a claim under the Handicappers' Act.

This Court held that the dispute was minor and thus within the exclusive jurisdiction of the federal administrative board.

792 F.2d at 579-81. *See Local 1477 Transp. Union v. Baker,* 482 F.2d 228, 230 (6th Cir. 1973)(labor dispute is classified as minor "if the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in [a] somewhat different statement, if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial'. . . ."). We declined to hold in *Stephens* that Stephens was discharged because of a handicap and we therefore did not address the question of preemption of the state handicap act by the federal act. In footnote 9 of the *Stephens* opinion, added after publication of the original opinion, we stated:

> This case does not involve discharge or discrimination against Stephens because of a handicap, and it does not in any way conflict with *Colorado Anti-Discrimination Commission v. Continental Airlines,* 372 U.S. 714 [83 S.Ct. 1022, 10 L.Ed.2d 84](1963). There are three issues to be decided in this case. First, whether the physical examination was legitimate. Second, whether Stephens could pass the examination. Third, if, as the trial court held, Stephens' complaint failed to state a claim on which relief could be granted under the Handicapper's Act, whether Stephens' unsuccessful attempt to rely on that Act could take his claim outside the exclusive jurisdiction of the NRAB.

811 F.2d at 286.

This case is not controlled by *Stephens* because the two acts did not come into direct conflict in *Stephens,* as they do here. In this case, a jury found that the railroad violated the state act, and a judgment was entered against the railroad. In *Stephens,* however, the issue was whether Stephens' complaint alleged a misinterpretation of the collective bargaining agreement. *Stephens* thus holds only that the federal board has exclusive jurisdiction over claims alleging breaches of collective bargaining agreements.

Although the difference in the issues presented in *Stephens* and this case may appear to be minor, they are not insubstantial. In *Colorado Anti-Discrimination, supra,* the Supreme Court held that a state statute prohibiting racial discrimination in employment was not preempted by the Railway Labor Act. The Court stated:

> Nothing in the Railway Labor Act or in our cases suggests that the Act places upon an air carrier a duty to engage only in fair nondiscriminatory hiring practices. The Act has never been used for that purpose, and we cannot hold it bars Colorado's Anti-Discrimination Act.

372 U.S. at 724. In *Stephens,* the *Colorado Anti-Discrimination* issue was not before us, because *Stephens* was controlled by the narrow principle that a claim involving interpretation of the collective bargaining agreement is governed exclusively by the Railway Labor Act. In this case, we are squarely presented with the issue of whether a state antidiscrimination statute can be preempted by the federal act. While *Stephens* may provide guidance in this case, it is therefore not controlling.

Atchison, T. & S. F. Ry. v. Buell, 107 S. Ct. 1410 (1987) is also pertinent. In *Buell,* the Court held that a railroad employee is entitled to bring suit under the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51 *et seq.,* even if the employee had the opportunity to pursue a labor grievance under the Railway Labor Act. The Court stated:

> This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. *See e.g., McDonald v. West Branch,* 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed. 2d 302 (1984); *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981); *Alexander v. Gardner-Denver*

> *Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Barrentine, supra,* 450 U.S. at 737, 101 S.Ct. at 1443.

107 S. Ct. at 1415.

Although *Buell* stands for the proposition that claims under substantive statutory rights may be decided outside of the labor arbitration machinery, it should not be read to overrule our decision in *Stephens* or to dictate a holding in this case that the state act is preempted. FELA, the statute involved in *Buell,* is a *federal* statute. Likewise, the statutes in the cases cited by the Court were all federal statutes. *McDonald,* 466 U.S. 284, involved a Fair Labor Standards Act claim. *Barrentine,* 450 U.S. 728, was an action brought under 42 U.S.C. § 1983. *Gardner-Denver,* 415 U.S. 36, was a Title VII case. In the instant case, we are concerned with a *state* statute. The issue is not the relationship between two federal statutes passed by Congress; it is the relationship between a federal statute and a state statute.

In *Stephens* we anticipated the result in *Buell.* Footnote 8 of the *Stephens* opinion pointed out that the case involved a conflict between a state statute and a federal statute, rather than a conflict between two federal statutes. We noted that precedent in other circuits supported the proposition that the interaction of two *federal* statutory schemes rebuts the exclusive jurisdiction presumption of the railway act. It is that proposition that the Supreme Court later adopted in *Buell.* However, we noted in *Stephens* that there was no authority for holding that a claim grounded on a *state* cause of action

can rebut the exclusive jurisdiction presumption of the Railway Labor Act. 792 F.2d at 581 n.8. The reasoning expressed in *Stephens* is applicable here. *Buell's* holding that FELA claims are not precluded by the railway act necessarily turned on an examination of congressional intent in enacting both the FELA and the Railway Labor Act. Here, McCall's claim is grounded in a state statutory cause of action, but the holding in *Buell* was that Congress did not intend for the railway act to repeal any part of the FELA. Our task in this case is to determine whether the state act conflicts with a federal law. Thus, although in *Buell* the intent of Congress in enacting both statutes was examined, the only congressional intent to be examined in this case is that underlying the federal railway act.

III.

Because neither *Stephens* nor *Buell* controls this case, we must look to the policies underlying railway labor preemption in order to determine whether the state claim is preempted here.

Preemption decisions are decisions interpreting the Supremacy Clause and must therefore be guided by respect for the separation and allocation of power among the various tribunals of the state and federal governments in our federal system. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). In preemption analysis,

> " '[t]he purpose of Congress is the ultimate touchstone.' " Where the pre-emptive effect of federal enactments is not explicit, "courts sustain a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.' "

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 747-48 (1985)(citations omitted).

In determining the preemptive effect of the railway act, we look not only to other railway act cases but to preemption decisions premised on other federal labor statutes. Although the preemptive effect of statutes such as the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, and the Labor Management Relations Act (LMRA), 29 U.S.C. § 141 *et seq.*, cannot be "imported wholesale into the railway labor arena," *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), courts may look to the construction of other federal labor statutes for assistance in construing this act. *Id.* Of the four judicially developed preemption doctrines, *see Jones v. Truck Drivers Local Union No. 299*, slip op. at 27-40 (6th Cir. Feb. 3, 1988)(Merritt, J., concurring in part and dissenting in part), two are involved in this case.[4]

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[4]The two types of preemption not involved in this case are *Brown* preemption and *Machinists* preemption.

Brown preemption, *see Brown v. Hotel and Restaurant Employees Local 54*, 468 U.S. 491, 503 (1984) provides that the states may not regulate conduct that is actually protected by federal law. As there is no federal right to discriminate on the basis of a handicap, there can be no argument that the state act is preempted by a conflict with a federally guaranteed substantive right.

Machinists preemption, *see Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), operates when a state seeks to alter the economic power of labor or management. Although the *Machinists* case was an NLRA case, its rationale that Congress established a balance of competing powers between labor and management with which states may not interfere seems applicable in some ways in the railway labor field. One might argue that the Handicappers' Act has altered the balance of power between labor and management because, prior to the passage of the Handicappers' Act, labor and management were free to negotiate the issue of physical qualifications for employment, and the Michigan statute has imposed a reasonableness test on those negotiations. However, *Machinists* preemption has been described as proscribing state regulation of "conduct that was to remain a part of the self-help remedies left to the combatants in labor disputes." *Belknap v. Hale*, 463 U.S. 491, 499 (1983)(citations omitted).

Under the Railway Labor Act, disputes involving the interpretation of collective bargaining agreements are characterized as "minor." *See Baker,* 482 F.2d at 230. In *Andrews v. Louisville & N. R.R.*, 406 U.S. 320 (1972), the Supreme Court held that because the act provided a mechanism for the resolution of minor grievances, an employee could not bring a state wrongful discharge action alleging that he was fired in violation of a collective bargaining agreement. The act's dispute resolution procedure was held to be mandatory; the situation was one in which "the Act makes the federal administrative remedy exclusive. . . ." *Id.* at 325.

This type of preemption is in some ways analagous to preemption by § 301 of the LMRA, 29 U.S.C. § 185(a). Section 301 authorizes direct suit in the district courts for violations of collective bargaining agreements. Whenever a state rule "purports to define the meaning or scope of a term" in a collective bargaining agreement, the state rule is preempted by the federal common law promulgated pursuant to § 301. *Allis-Chalmers v. Lueck,* 471 U.S. 202, 210 (1985). *See also Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 103-04 (1962); Field, *Sources of Law: The Scope of Federal Common Law,* 99 Harv. L. Rev. 883 (1986).

If McCall alleged in this case that his removal from service violated the terms of the collective bargaining agreement and

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Thus *Machinists* preemption might be construed to be applicable only to the type of conduct which gives rise to "major" disputes. (*See Baker,* 482 F.2d at 230, for distinction between major and minor disputes.) However, we need not decide the scope of *Machinists* preemption. The question whether Michigan has altered the balance of power between labor and management by imposing a reasonableness requirement on collectively bargained physical job qualifications collapses in this case into the question whether the arbitration board has the power to decide if an employee is physically qualified to perform the duties of his or her job. This question is discussed in part III. B., *infra.*

violated the state act, his claim would clearly be preempted as "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Lueck*, 471 U.S. at 220. McCall asserts his claim as one which is independent of the collective bargaining agreement. He claims that regardless of the terms of the agreement, C&O cannot under Michigan law discriminate against him because he is an insulin-requiring diabetic.

Statutes that purport to establish rights that are independent of rights under a collective bargaining agreement are not necessarily preempted even if they relate to the agreement in some way. *See Lueck*, 471 U.S. at 212-13. In this manner the policies of *Colorado Anti-Discrimination, supra*, are vindicated. An employer cannot simply hide behind the arbitration provisions of a collective bargaining agreement to bypass his or her employees' statutory right not to be discriminated against. Michigan clearly has an interest in regulating employment discrimination. *Cf. San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243-44 (1959)(if activity state seeks to regulate is "merely peripheral concern" of federal statute or touches "interests . . . deeply rooted in local feeling and responsibility," statute will not be held preempted absent "compelling congressional direction."). We cannot hold that Michigan's interest in eradicating employment discrimination must give way to the federal interest in regulating labor-management relations in the railway context merely because the rights protected under the state act relate to the collective bargaining agreement in some way. A stronger nexus must exist for the state act to be preempted.

B. *Frustration of the Federal Railway Dispute Resolution Scheme*

Although the existence of a relationship between rights regulated by the state and the collective bargaining agreement is not in itself enough to mandate preemption, the strong similarity between the inquiry made by the arbitration board and

the inquiry made by the jury in the state cause of action requires that the Michigan statute be preempted in this case.

Section 153 Second of the railway act allows railroads and labor unions to voluntarily establish boards of adjustment to resolve disputes. The collective bargaining agreement in this case established just such a board, and thus its decision was binding on the railroad and McCall. The board was empowered to make findings and reach a decision as to McCall's physical ability to continue in service. The jury in McCall's state action had to decide whether McCall's diabetes is a handicap that is unrelated to his ability to perform the duties of his job. Thus, the arbitration board and the jury had to make essentially the same decision — whether McCall is physically able to perform the duties of his job. The state cause of action is therefore preempted since it is "based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the R.L.A.," *Stephens,* 791 F.2d at 580, *quoting Magnuson v. Burlington Northern, Inc.,* 576 F.2d 1367, 1369 (9th Cir.), *cert. denied,* 439 U.S. 930 (1978). If McCall can litigate an issue on the merits before an arbitration board created pursuant to § 153 Second and a collective bargaining agreement and then relitigate the identical issue in an independent judicial proceeding, the purposes of railway labor arbitration would be frustrated. *See Andrews,* 406 U.S. at 325.

The NLRA doctrine that has come to be known as *Garmon* preemption, while not completely transferable to the railway labor context, provides the reason why the state claim is preempted in this case. The federal act was intended to serve the interests of railroad employees by creating a statutory scheme providing for the final settlement of grievances by a tribunal composed of people experienced in the railroad industry. *Union Pacific R.R. Co. v. Price,* 360 U.S. 601, 614 (1959). Although the structure of the arbitration process under the federal act is somewhat different than the grievance process under the NLRA, both statutes envision binding

administrative proceedings into which virtually all individual labor-management disputes are directed. In the NLRA context, *Garmon* preemption takes this concern into account. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competance of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Building Trades Council v. Garmon,* 359 U.S. at 245. If McCall's dispute with the railroad had been governed by the arbitration provisions of § 153 First, *Garmon*-type preemption would clearly apply, since § 153 First provides for arbitration before the National Railroad Adjustment Board. Entrusting interpretation of the statute to a centralized administrative agency serves to promote uniformity in national labor policy. *Cf. Garmon,* 359 U.S. at 242-43.

The national uniformity argument is not as compelling when, as in this case, the arbitration is conducted under the authority of § 153 Second, which allows labor and management to bypass the national board by establishing system, group, or regional boards. *Garmon*-type preemption's purpose of preventing conflicting interpretations of a labor statute is less likely to be achieved in a system in which a number of arbitration boards are empowered to make final binding decisions. However, the possibility of varying substantive interpretations of the federal act by different arbitration boards is not that great; unlike the NLRA, which defines employee rights and unfair labor practices, the railway act contains few substantive provisions to be interpreted. Instead, the railway act leaves the establishment of most substantive rights to the collective bargaining process and merely provides mechanisms for enforcing those rights. However, the policy of the railway act is to channel dispute resolution to either the national board or the various voluntarily established boards. The exercise of state power over an area of activity specifically relegated to the railway act dispute reso-

lution process therefore causes a danger of conflict with national labor policy great enough to mandate preemption. *Cf. Garmon,* 359 U.S. at 246. The potential for conflict is realized in this case: the decision of the arbitration board and the decision of the jury on the issue of McCall's ability to continue working as an engineer are in direct conflict. If the federal dispute resolution mechanism is to have any force, juries cannot be allowed to second-guess the decisions of arbitration boards.

This reasoning is reinforced by the principle established almost 30 years ago in the "Steelworkers Trilogy." *See United Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960). In these cases, the Court gave great deference to the arbitration process. "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Steelworkers v. Enterprise Corp.,* 363 U.S. at 596. *See also United Paperworkers Int'l Union v. Misco, Inc.,* 108 S.Ct. 364 (1987)(holding that courts cannot reconsider the merits of an arbitrator's award).

C. *The Relationship Between Preemption and Colorado Anti-Discrimination*

The federal act preempts the state claim in this case, however, only if such a result does not conflict with *Colorado Anti-Discrimination, supra.* Just as nothing in the federal act suggests that a carrier has a duty not to discriminate on the basis of race, *see Colorado Anti-Discrimination,* 372 U.S. at 724, nothing in the act suggests that a carrier cannot discriminate on the basis of handicap. Thus, under the reasoning of *Colorado Anti-Discrimination,* Michigan may be able to regulate the railroad in this manner.

Additionally, *Garmon*-type preemption does not necessarily apply to all exercises of state power that may interfere with national labor policy:

> [D]ue regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was merely a peripheral concern of the Labor Management Relations Act. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

Garmon, 359 U.S. at 243-44 (citations and footnotes omitted).

This case does not fall within the ambit of either *Colorado Anti-Discrimination* or the exceptions to *Garmon*-type preemption, but those considerations do dictate that our result be a narrow one. Preempting the state claim in this case does not conflict with *Colorado Anti-Discrimination* because the statute at issue in that case regulated racial discrimination, conduct that is not by any construction a subject for collective bargaining and arbitration. The Handicappers' Act, however, is a different type of statute. Although the *purpose* of the statute — eliminating discrimination on the basis of handicap —may be for some as laudable as the purpose of the Colorado statute, the methodology employed in determining statutory violations is necessarily different from the methodology employed in ascertaining whether an employer has discriminated on the basis of race. In the case of a statute barring racial discrimination, the only inquiry made is whether the motivation for the challenged action was the employee's race. In the case of the Handicappers' Act, the inquiry must go

further: once it is established that the challenged action was taken on account of the employee's physical condition, it must also be determined that the employee's physical condition is unrelated to job performance. It is the necessity of the second level of inquiry which leads to our conclusion that the state claim is preempted in this case. The parties in this case committed the determination of whether a particular physical condition affects an individual's ability to perform the duties of an engineer or fireman to the arbitration process. *See* n. 1, *supra*. The inquiry made by the arbitration board —whether McCall's insulin-requiring diabetic condition allows him to perform the duties of an engineer or fireman —is the same factual inquiry made by the jury in McCall's Handicappers' Act suit. The arbitration board did not decide that McCall could not keep his job regardless of whether his physical condition affected his job performance; it decided that he could not keep his job because his physical condition would not allow him to perform his duties. Only if the board had made the former decision would a conflict with the principles of *Colorado Anti-Discrimination* present itself.

We give deference judicially to the arbitration process. The state legislation in this case relates directly to the employee's ability to perform and contravenes the process set out by Congress and agreed to by the parties through collective bargaining (Addendum 27) to decide the "physical fitness of the engineer to continue in service of the carrier," which is itself a matter subject to extensive federal regulation.

The principle of federalism would seem to support the outcome reached in this case. Michigan cannot superimpose a state remedy upon a regulated interstate carrier engaged in commerce whose employment relationships with its employees, including disputes about ability to perform an important job function concerning public safety, are governed by federal legislation providing for fair and binding arbitration. Antidiscrimination legislation that does not relate to medical

ability to perform a job (such as the engineer's job here involved) may call for a different result:

> . . . [C]ourts must examine closely the facts of each case to determine whether the dangers and hardships of diverse regulation justify foreclosing a State from the exercise of its traditional powers.

Colorado Anti-Discrimination, 372 U.S. at 719. It should also be noted that in *Colorado Anti-Discrimination* it was *not* contended by the air carrier that the Colorado statute was "in direct conflict with federal law" or "that it stands as an obstacle to the full effectiveness of a federal statute." *Id.* at 722. The Supreme Court in that case was not called upon to conclude "that the purpose of the federal statute would to some extent be frustrated by the state statute." *Id.*

The exceptions to *Garmon*-type preemption are inapplicable for similar reasons. Although it may well be that the eradication of discrimination against handicapped persons is an interest "deeply rooted in local feeling and responsibility," we do not hold that the state act is preempted by the federal act in all cases; and we do not address the issue of what effect, if any, the state act would have on an arbitration that did not consider whether the employee was physically able to perform the duties of his or her job. We simply hold that when an arbitration board established pursuant to § 153 Second is required by the collective bargaining agreement to make the same factual inquiry regarding physical ability to perform a job as would be made under the state act, the federal dispute resolution process is the sole remedy. The activity being regulated by Michigan in this case is factfinding by the arbitration board; this is not a "peripheral concern" of the federal act but is central to the dispute resolution process. There is not merely a risk of infringement on an area of primary federal concern in this case, there is a direct conflict. Therefore, the state claim is preempted.

IV.

In his brief, McCall implies that the process by which the third member of the arbitration board that decided his case was selected was tainted, and that the third member was not neutral. He also argues that the arbitration board applied a blanket rule which disqualified all insulin-requiring diabetics from train and engine service.

Although McCall's arguments on these points may have merit, he is foreclosed from raising them here. The collective bargaining agreement provides that the arbitration board shall make a decision as to the physical fitness of an individual engineer. McCall's only avenue of review for the decision of the arbitration board is set out in § 153 First (q), which also applies to boards established under the authority of § 153 Second:

> If any employee . . . is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award, . . . then such employee may file in any United States district court [with personal jurisdiction] a petition for review of the division's order. . . . The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, *the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.* The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28.

45 U.S.C. § 153 First (q)(emphasis added). Thus, if McCall felt he received unfair treatment from the arbitration board, or if he felt the arbitration board violated the collective bargaining agreement by not considering the particulars of his case, he could have sought judicial review of the board's decision. He could not, however, circumvent the finality of the board's decision by attempting to bring the same claim under a state cause of action. *See Stephens, supra.*

The judgment of the District Court is vacated, and the case is remanded with instructions to dismiss the plaintiff's claim.

No. 88-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GERARD W. MCCALL,

Petitioner,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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July 29, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether a railroad locomotive engineer who was medically disqualified from work and processed his claim that he is physically able to safely perform his job under the exclusive procedures mandated by the Railway Labor Act, 45 U.S.C. § 153, and having said claim adjudicated against him by a three-doctor panel convened to consider his claim, may nevertheless recover a verdict for damages predicated upon precisely the same claim under a state handicap law, which claim of necessity involves the interpretation of the express and implied terms and conditions of his railroad collective bargaining agreement which encompass the physical requirements and medical qualifications involved in the scope and details of his railroad work.

PARTIES TO THE PROCEEDINGS

Petitioner Gerard W. McCall was the appellee in the proceeding before the United States Court of Appeals for the Sixth Circuit, whose judgment is sought to be reviewed.

Respondent Chesapeake & Ohio Railway Company (hereinafter "C&O") was the appellant in the proceeding below. On August 31, 1987, C&O was merged into CSX Transportation, Inc. (hereinafter "CSXT"). CSXT is a wholly-owned subsidiary of CSX Corporation (hereinafter "CSX"). The subsidiaries and affiliates of CSX and CSXT, other than those wholly owned by them, are as follows:

1. CSX Realty, Inc., a wholly owned subsidiary of CSX, has a partial interest in Mid-Allegheny Corporation.

2. CSXT has a partial interest in the following:
   a. Allegheny and Western Railway Company;
   b. The Baltimore and Philadelphia Railroad Company;
   c. Clearfield and Mahoning Railway Company;
   d. Dayton and Michigan Railroad Company;
   e. Dayton and Union Railroad Company;
   f. The Home Avenue Railroad Company;
   g. The Cleveland Terminal & Valley Railroad Company;
   h. Augusta and Summerville Railroad Company;
   i. Beaver Street Tower Company;
   j. Central Transfer Railway and Storage Company;
   k. Chatham Terminal Company;
   l. North Charleston Terminal Company;
   m. Paducah & Illinois Railroad Company;
   n. Winston-Salem Southbound Railway Company;
   o. Woodstock & Blockton Railway Company.

3. Western Maryland Railway Company, a wholly owned subsidiary of CSXT, has a partial interest in

the Baltimore and Cumberland Valley Railroad Extension Company.

4. CSXT has a partial interest in Richmond Washington Company, which in turn has a partial interest in the Richmond, Fredericksburg and Potomac Railroad Company.

As a matter of convenience, the Respondent will be referred to as the C&O throughout the brief.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decisions below of the United States District Court for the Eastern District of Michigan, Southern Division, and of the United States Court of Appeals for the Sixth Circuit are contained in the Appendix to the Petition. Subsequent to the filing of the Petition herein, the Sixth Circuit issued its order denying petitioner's "Motion for Late Reconsideration" on July 11, 1988, which is contained in the Supplemental Appendix attached hereto. (Opp. App., *infra*, 1a.)

STATUTE INVOLVED

The Railway Labor Act (hereinafter "RLA"), 45 U.S.C. § 151, *et seq.*, the pertinent parts of which are set forth in the Appendix hereto. (Opp. App., *infra*, 3a-5a.)

STATEMENT OF THE CASE

On June 15, 1983, petitioner McCall was removed from his position as a locomotive engineer by the Medical Officer of his employer, the C&O, because of an uncontrolled diabetic condition which did not allow him to safely perform his job. His own treating physician disagreed, being of the opinion that Mr. McCall was physically and mentally able to perform the regular duties of his position.

On September 1, 1983, the General Committee of Adjustment of the Brotherhood of Locomotive Engineers, on behalf of Mr. McCall, requested that a three-doctor panel be convened under Addendum No. 27 to the collective bargaining agreement (Opp. App., *infra*, 6a-7a), as provided for in 45 U.S.C. § 153 Second. Thereafter, the two doctors agreed upon a third physician meeting the criteria specified in Addendum No. 27, who was furnished with a fifty-nine (59) page analysis of the job requirements of a railroad locomotive engineer, together with the medical requirements of the job. After obtaining a detailed history from Mr. McCall and performing a medical examination upon him, the third physician submitted a report which agreed that Mr. McCall should not be permitted to be an engineer/fireman while taking insulin which did not control his diabetes, and the Brotherhood was duly notified of the majority decision against Mr. McCall. (Opp. App., *infra*, 10a-11a.) Con-

trary to the assertions in the Petition, Mr. McCall's disqualification was not pursuant to any blanket policy of the railroad disqualifying all diabetics, or even those who required insulin. Rather, it was a medical finding, predicated upon the scope and physical requirements of his job as established under the applicable collective bargaining agreements, together with Mr. McCall's medical history and physical examinations, that he was not physically qualified to safely perform his railroad work, which caused his disqualification.

Thereafter, petitioner made no further submissions or appeals under the RLA, either to the Board or to the federal district court as required under the Act.

Instead, petitioner filed a claim for damages under the Michigan Handicapper's Civil Rights Act, Mich. Comp. Laws § 37.1101, *et seq.* (1985), alleging that his disability was unrelated to his ability to perform his railroad job. The case, filed in the United States District Court for the Eastern District of Michigan, Southern Division, resulted in a jury verdict in favor of Mr. McCall in the amount of $328,000.00.

The C&O appealed to the United States Court of Appeals for the Sixth Circuit, which reversed, holding that Mr. McCall's claim under the state handicap statute was preempted by the provisions of the RLA.[1] Subsequent thereto, and pursuant to this Court's decision in *Lingle v. Norge Division of Magic Chef, Inc.*, ___ U.S. ___ , 108 S.Ct. 1877 (1988), petitioner moved for rehearing, which motion was denied on July 11,

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[1] Because its preemption holding was dispositive of the case, the Sixth Circuit did not rule on the other grounds asserted in the C&O's appeal.

1988 (Opp. App., *infra*, 1a), subsequent to the filing of the Petition herein.

SUMMARY OF ARGUMENT

The Petition herein is premised upon the claim that the Sixth Circuit's decision below is contrary to established precedent of this Court which allows independent state statutory rights to be vindicated in the courts, despite the availability of arbitration procedures pursuant to collective bargaining agreements. (Petition, at p.5.) Indeed, as framed in the Petition's "Question Presented", petitioner asserts that his claim does not involve the interpretation of his railroad collective bargaining agreement. From that point, the Petition seeks to avail itself of this Court's decision in *Lingle v. Norge Division of Magic Chef, Inc.*, *supra*, and other decisions involving § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185.

As will be demonstrated below, the assertions in the Petition are entirely misplaced and overlook the applicable body of settled law contained in the decisions of this Court pertaining to so-called "minor disputes" under Section Three of the RLA. Those decisions clearly establish that a dispute arising out of a railroad worker's claim that he is physically capable of performing his duties is a "minor dispute" under that Act and that the decision of a three-doctor panel convened under 45 U.S.C. § 153 Second is final and binding upon the parties, absent the limited statutory review provided for in 45 U.S.C. § 153 First (q). Those decisions also provide that neither party may collaterally attack the panel's decision, as was

done by Petitioner in his subsequent claim below for damages under Michigan's handicap discrimination law.

Moreover, the Petition's reliance on *Lingle, supra*, and related cases predicated upon the Labor Management Relations Act is misplaced, as this Court has carefully distinguished between the arbitration thereunder which is agreed to by the parties, and the arbitration which is mandatory and binding upon the parties under the RLA.

ARGUMENT

The Petition herein is curiously silent as to the many pronouncements by this Court holding that so-called "minor disputes" under the RLA are subject to resolution under the mandatory and exclusive procedures established by that Act. As will be developed below, petitioner's claim that he is physically qualified to perform his railroad work is such a "minor dispute", and the resolution of his claim under the RLA, as here, precludes his attempt to relitigate such claim under the guise of state law. The Act provides the sole means by which an aggrieved party may obtain judicial review of his claim, so as to preempt any collateral attack under state law.

I

QUESTIONS OF PHYSICAL ABILITY TO PERFORM RAILROAD WORK ARE "MINOR DISPUTES" SUBJECT TO THE MANDATORY AND EXCLUSIVE PROCEDURES MANDATED BY THE RLA

Although the railroads maintained for many years that the setting of physical standards for the various categories of railroad workers (as well as the related question as to whether an employee was medically

qualified thereunder) was purely a prerogative of management, this Court's decision in *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257 (1965), held the same to constitute a "minor dispute" subject to the exclusive arbitration procedures mandated under Section Three of the RLA.[2]

In *Gunther*, as here, a three-doctor panel was convened to evaluate a locomotive engineer's grievance that he was physically qualified to safely perform the requirements of his job, and rendered its judgment by a divided vote. This Court not only held that an employee's claim of physical qualification was a "minor dispute" under the Act, but also spoke to the wisdom of creating three-doctor panels to adjudicate the claim:

> In § 3 Congress has established an expert body to settle "minor" grievances like petitioner's which arise from day to day in the railroad industry.
>
> * * * * * * * * *
>
> As hereafter pointed out Congress, in the Railway Labor Act, invested the Adjustment Board with the broad power to arbitrate

---

[2] Under the "major/minor" dispute dichotomy which has arisen under RLA, the so-called "minor disputes" are "all disputes" growing out of either "grievances" or the "interpretation or application of agreements covering rates of pay, rules or working conditions," 45 U.S.C. § 151a; thus the plain language of the Act encompasses not only claims based upon an express term of the collective bargaining agreement, but also those "founded upon some incident of the employment relation . . . independent of those covered by the collective agreement. . . ." *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723 (1945).

> grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, serving on the Adjustment Board with their long experience and accepted expertise in this field.
>
> The courts below were also of the opinion that the Board went beyond its jurisdiction in appointing a medical board of three physicians to decide for it the question of fact relating to petitioner's physical qualifications to act as an engineer. We do not agree. The Adjustment Board, of course, is not limited to common-law rules of evidence in obtaining information.
>
> * * * * * * * * *
>
> On a question like the one before us here, involving the health of petitioner, and his physical ability to operate an engine, arbitrators would probably find it difficult to find a better method for arriving at the truth than by the use of doctors selected as these doctors were.

382 U.S. at 261-62.[3] The *Gunther* decision then proceeded to discuss this Court's prior holdings as to the "mandatory", "exclusive" and "complete and final

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[3] In *Gunther*, the Court noted that the current agreement contained a provision for the appointment of a three-doctor panel to adjudicate such questions (386 U.S. at 262). In the case at bar, Addendum No. 27 of the C&O Agreement covering petitioner contains a similar provision. (Opp. App., *infra*, 8a-9a.)

means for settling minor disputes" under the RLA, and went on to hold:

> The basic grievance here—that is, the complaint that petitioner has been wrongfully removed from active service as an engineer because of health—has been finally, completely, and irrevocably settled by the Adjustment Board's decision. Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court.

382 U.S. at 264. While the Petition asserts that Mr. McCall's claims ". . . do not involve interpretation of the collective bargaining agreement" (*See*, Petition, "Question Presented"), it is mistaken, for his claim is inextricably interwoven in the fabric of the express and implied agreements embodied therein.

One need only look to Addendum No. 27 to demonstrate these express and implied agreements, as well as the custom and practice of the industry, which are involved in such a claim. Of course, Addendum No. 27 itself is the express agreement which establishes the procedure for selection of the three-doctor panel, as well as the specific qualifications required of the so-called "neutral doctor".[4] It specifies that the medical board shall determine ". . . the physical fitness of the engineer to continue in service of the

[4] The agreement specifies that he shall be (1) a practitioner, (2) of recognized standing in the medical profession, and (3) a specialist in the disease allegedly suffered by the engineer. (Opp. App., *infra*, 8a, ¶ 5.)

carrier . . .", and that the findings of the majority of the board ". . . shall be final and binding upon the carrier, the engineer and the Brotherhood . . .", yet provides for the future circumstances where there may be a change in the engineer's physical condition. (Opp. App., *infra*, 8a ¶ 4.)

Subsumed within these express provisions are implied agreements, such as the "triggering" device for Addendum No. 27—a finding of physical disqualification by the carrier's Chief Medical Examiner—which provision recognizes the carrier's custom and practice that the carrier initially sets the physical qualifications and then conducts physical examinations to assure that the employee is fit to safely perform his job. Also subsumed within the agreement are the terms and conditions of the employee's job, *i.e.*, what his job consists of and the necessary physical/medical qualifications therefor.[5] Even the physical requirements of the job are not static, as they in turn depend upon the work of a given craft, which may change from time to time as collective bargaining agreements are amended, due either to changing technology or to changes in the carrier's agreements with yet other Brotherhoods.[6]

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[5] In this case, the Medical Panel was supplied with a "Job Analysis Summary" authored by a consultant, which was developed jointly by nine railroads and approved by the Steering Committee of the Railroad Personnel Association. The Summary is 59 pages in length, and encompasses the specifics of locomotive work, the physical requirements utilized in connection therewith, and the medical standards therefor.

[6] The job requirements of locomotive work have undergone substantial change over the years, earlier with the advent of the diesel locomotive which largely eliminated the requirement of a

It is clear beyond peradventure that a claim involving the physical qualification of a railroad employee for his job involves the interpretation and application of the express and implied conditions of his collective bargaining agreement, and is thus a "minor dispute". As such, it is subject to the mandatory, exclusive and final adjudication procedures required by the RLA.

II

THE COURT BELOW WAS CORRECT IN HOLDING PETITIONER'S STATE CLAIM PREEMPTED BY THE RLA

The decision of the court below holding petitioner's claim under the Michigan statute preempted by the RLA was correct. It is in accord with the two cases decided by this Court since *Gunther*, *supra*, wherein railroad workers sought to bypass the RLA's mandatory and exclusive procedures in cases involving "minor disputes" by resorting to state remedies.

In *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), the plaintiff attempted to return to work following an automobile accident, but was found to be physically disqualified by the carrier. Based upon his assertion that he was fully recovered and physically able to resume his work on the railroad, he sued under Georgia law for "wrongful discharge". This Court discussed the fact that Andrews' claim of entitlement to return to duty was of necessity predicated upon the collective bargaining agreement, and was therefore subject to the RLA's requirement that it be submitted to the Board for adjustment. In af-

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fireman and, more recently, with the discontinuation of the "caboose", the latter change increasing the monitoring of a train which must be done from the locomotive.

firming the judgment dismissing the employee's complaint, this Court said:

> It is clear, however, that in at least some situations the Act makes the federal administrative remedy exclusive, rather than merely requiring exhaustion of remedies in one forum before resorting to another. A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. [Citation omitted.] He is limited to the judicial review of the Board's proceedings that the Act itself provides. [Citation omitted.] In such a case the proceedings afforded by 45 U.S.C. § 153 First (i), will be the only remedy available to the aggrieved party.

406 U.S. at 325.[7]

The Petition places great reliance upon the Court's recent decision in *Lingle v. Norge Division of Magic Chef, Inc., supra*, (together with related cases decided under the Labor Management Relations Act of 1947), for the proposition that state remedies are not preempted by the RLA's system for adjudicating "minor disputes".[8] Such reliance, however, is totally mis-

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[7] As noted in the Petition herein, Mr. McCall admits that the three-doctor panel ". . . was provided under the minor dispute resolution provisions of the Railway Labor Act" which ruled 2-1 that "Petitioner was disqualified from continuing work. . . ." (Petition, at p.4.)

[8] *Lingle* involved a claim under state law for "retaliatory discharge" for filing a claim under the state's workmens' compensation law. This Court, after analyzing the elements of recovery,

placed by reason of a fundamental difference between the two Acts—under the LMRA arbitration is pursuant to the agreement of the parties, whereas under the RLA, the remedy is statutorily compelled.[9] Moreover, there is nothing in the LMRA which approaches the conclusive nature of the RLA's provision for the final and binding nature of the administrative decision: "Such awards shall be final and binding upon both parties to the dispute. . . ." 45 U.S.C. § 153 Second.[10] Significantly, this Court commented upon these differences and their legal effect in *Andrews*, *supra*:

> Indeed, since the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems not from any contractual undertaking between the parties but from the Act itself, the case for insisting on resort to those remedies is

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and determining that the only issues were ". . . the conduct of the employee and the conduct and motivation of the employer . . .", neither of which required resort to the collective bargaining agreement, held the claim not preempted under the analysis in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

[9] In *Andrews*, *supra*, this Court made it clear that ". . . the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law." 406 U.S. at 322.

[10] Quite apart from preemption considerations, this statutory provision provides a basis for total issue preclusion as to matters contested, such as those here. As held in *Gunther*, "a party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding." 406 U.S. at 235.

> if anything stronger in cases arising under [the Railway Labor Act] than it is in cases arising under § 301 of the LMRA.

406 U.S. at 323.

Another principle totally distinguishes the Labor Management Relations Act cases from those under the RLA for preemption purposes. In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. ___, 107 S.Ct. 2211 (1987), this Court emphasized that preemption should not be lightly inferred under the LMRA, since the establishment of labor standards falls within the traditional police power of the states. The situation as to railroads operating in interstate commerce, however, is quite the opposite. The Congress has created federal legislation covering virtually every aspect of labor standards for the rail industry far beyond the RLA. For instance, railroad workers injured on the job are not subject to workers' compensation laws but to the remedy provided under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* Their claims for disability, unemployment and retirement are subject not to state law but to the Railroad Retirement Act (45 U.S.C. § 231, *et seq.*) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351, *et seq.*). Even the number of hours railroad employees are allowed to work are specified in the Hours of Service Act (45 U.S.C. § 61, *et seq.*), which this Court held preempted any state regulations on the subject. *See, e.g., Erie R. Co. v. New York*, 233 U.S. 671 (1914).[11]

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[11] In addition, the Rail Safety Act (45 U.S.C. § 421, *et seq.*) and the regulations thereunder relate to virtually all aspects of railroad working conditions. The provisions of that Act provide an interesting contrast to the *Lingle* rationale, inasmuch as that

Moreover, the employee herein, having initiated his RLA remedy by requesting the three-doctor panel under the collective bargaining agreement, and having been aggrieved by the decision of the panel, totally failed to avail himself of the court review provided for in the statute.[12] In *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89 (1978), this Court spoke to the necessity of adhering to the compulsory procedures of the RLA and the importance of the finality of decisions thereunder:

> In enacting [the Railway Labor Act], Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective bargaining agreements. [Citations omitted.]
>
> * * * * * * * * *
>
> Congress considered it essential to keep these so-called "minor" disputes within the Adjustment Board and out of the courts. [Citation omitted.] The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations.

Act prohibits "retaliatory discharge", but specifies that such claim is subject to the "minor dispute" resolution procedures of the RLA. 45 U.S.C. §§ 441(a), 441(c)(1).

[12] 45 U.S.C. § 153 Second provides that the findings of the panel shall be final and binding upon both parties, and enforceable in the same manner as decisions of the Adjustment Board. 45 U.S.C. § 153 First(q) provides for review of Board decisions in the federal courts on limited grounds.

> Normally finality will work to the benefit of the worker: He will receive a final administrative answer to his dispute; and if he wins, he will be spared the expense and effort of time-consuming appeals which he may be less able to bear than the railroad. [Citation omitted.] Here, the principle of finality happens to cut the other way. But evenhanded application of this principle is surely what the Act requires.

439 U.S. at 94. Here, Mr. McCall, dissatisfied with the result of his RLA remedy, failed to seek any court review under the RLA—instead, he sought to recover under Michigan's law applicable to handicapped persons. And, as noted by the court below, his allegations were precisely the same as those involved in his RLA claim—that notwithstanding his medical condition, he was physically capable of performing his railroad job, the terms and conditions of his work being embodied within his collective bargaining agreement.

In reversing the verdict against the railroad on the grounds of the preemptive effect of the RLA, the court below was in full accord with this Court's decisions in *Gunther*, *Andrews* and *Sheehan*. Any other result would frustrate the very intent of the RLA in providing for expert and final adjudication of "minor disputes" under the compulsory statutory framework.[13] Instead of promoting the Congressional intent

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[13] The $328,000 verdict in petitioner's favor, if allowed to stand, demonstrates the vast differences and inconsistencies in the handling of his claim under the Michigan statute, as contrasted with his rights under the collective bargaining agreement. Although he would pocket the $328,000 district court verdict representing

of providing stability in railroad labor matters by a uniform system of handling such claims, it would subject the same to varying notions as to what constitutes a "handicap" as adopted by the several states in their particular statutes, so that a jury can produce an entirely different result (such as that obtained in the trial court below) on the identical issue adjudicated pursuant to the exclusive statutory remedy prescribed by the Congress.

It is submitted that the decision below was entirely in accord with this Court's pronouncements vitiating state remedies for claims which constitute "minor disputes" under the RLA by reason of that Act's mandatory, exclusive and final means of settling such disputes which arise in the railroad industry. Accordingly, the Petition presents no special or important reasons for this Court to invoke its discretionary *certiorari* jurisdiction to review the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

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his railroad wages in the future, he nevertheless still has the right under his agreement to re-qualify for his railroad job at any time when his diabetes comes under control. In this regard, Addendum No. 27, in speaking to the "final and binding" character of the decision of the medical panel, specifically provides that ". . . this does not mean that a change in physical condition will preclude a re-examination at a later time." (Opp. App., *infra*, 8a, ¶ 4.)

Respectfully submitted,

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July 29, 1988

SUPPLEMENTAL APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-1462

GERARD W. MCCALL,	)	
	)	
Plaintiff-Appellee,	)	
	)	ORDER DENYING
	)	MOTION FOR
v.	)	"LATE
	)	RECONSIDERATION"
CHESAPEAKE & OHIO RAILWAY COMPANY, a Virginia corporation qualified in Michigan,	)	
	)	
Defendant-Appellant.	)	

Before: MERRITT, MARTIN and WELLFORD, Circuit Judges.

The Court declines to order rehearing or reconsideration in this case based upon plaintiff-appellee's submission of *Linge*[sic] *v. Norge Division of Magic Chef, Inc.*, a case decided June 6, 1988, by the Supreme Court, No. 87-259. The Court has reviewed the slip opinion submitted and concludes that the *Linge*[sic] case does not dictate a contrary result. In the instant case the state handicap action can only succeed under the Supremacy Clause of the Constitution if the collective bargaining agreement adopted under the Railway Labor Act is interpreted to mean that the employee's handicap is unrelated to job performance. If the handicap is job related, management has authority under the collective bargaining agreement to terminate. Thus, the state law handicap action necessarily requires an interpretation of the collective bargaining agreement concerning the job relatedness of the employee's handicap. *Linge*[sic] holds that in such cases requiring contract interpretation the state law action must be preempted.

Accordingly, rehearing is DENIED.

ENTERED BY ORDER OF THE COURT

LAWRENCE GREEN
Clerk

STATUTORY PROVISIONS

The Railway Labor Act

45 U.S.C. § 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act [enacted June 21, 1934], and it is hereby provided—

* * * * * * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act [enacted June 21, 1934], shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * * * * * *

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms

of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code [28 USCS §§ 1254, 1291].

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

* * * * * * * * *

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board,

neutral member, compensation, quorum, finality and enforcement of awards. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

* * * * * * * * *

Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day, named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

GENERAL COMMITTEE OF ADJUSTMENT
BROTHERHOOD OF LOMOMOTIVE ENGINEERS
CHESSIE SYSTEM (PM-HV DISTRICTS)
4005 West River Drive, N.E. - P.O. Box 278
Comstock Park, Michigan 49321

A.W. Gall, General Chairman
Telephone (616) 784-2620
C.L. McAnalley, Vice General Chairman
W.E. Corne, Secretary-Treasurer

[Chessie System Labor
Relations Department
Baltimore, MD
Sep 07 1983]

September 1, 1983

Mr. D.T. Kelly
Director Labor Relations
Chessie System
100 North Charles Street
Baltimore, MD 21201

RE: Engineer G.W. McCall-
Employee No. 2406759

Dear Sir:

This refers to my letter of July 26, 1983, and to your response of August 29, 1983.

Engineer G.W. McCall was disqualified to work as an engineer by letter dated June 15, 1983. I wrote to you on July 26, 1983; furnishing copy of letter of Dr. W.L. Hailer, Engineer McCall's family physician, which deemed Engineer McCall fit for duty, and asking that you restore Engineer McCall to duty as an engineer.

I refer you to Paragraph (1) of Addendum No. 27, of the Pere Marquette District Engineer's Agreement, and especially to that part which reads;

> "If appeal is presented with this time limit, arrangements will be made for the engineer to be examined by a special medical board compromised of one selection by the General Chairman, the Chief Medical Examiner of the Carrier, and the two thus selected will select a third member to agreed upon by them."

Your letter of August 29, 1983 only reiterated the position of the Carrier's Medical Department.

I would request that you make arrangements to have Engineer G.W. McCall examined in accordance with the provisions of Addendum No. 27. My selection for this special medical board is:

Dr. W.L. Hailer, D.O.
Trenton Clinic, P.C.
3231 West Road
Trenton, Michigan 48183
Telephone: 1-313-676-7500

Very truly yours,

Arlow W. Gall
General Chairman

[DEFENDANT'S EXHIBIT
8
3-13-86 pjc]

ADDENDUM NO. 27

AGREEMENT BETWEEN THE CHESAPEAKE AND OHIO RAILWAY COMPANY (PERE MARQUETTE DISTRICT) AND ITS EMPLOYEES REPRESENTED BY THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS

(1) When a locomotive engineer is found to be physically disqualified by the Carrier's Chief Medical Examiner, and the Brotherhood of Locomotive Engineers is of the opinion that such engineer's condition does not justify removal from the service, or restriction of his rights to service, appeal must be made in writing to the Assistant Vice President Labor Relations by the General Chairman of the Brotherhood of Locomotive Engineers within sixty calendar days of the date the engineer is notified of his disqualification or restriction. If appeal is presented within this time limit, arrangements will be made for the engineer to be examined by a special medical board comprised of one physician selected by the General Chairman, the Chief Medical Examiner of the Carrier, and the two thus selected will select a third member to be agreed upon by them.

(2) The Engineer shall submit himself to this board for physical examination.

(3) The medical board so appointed will render a joint report of their findings and decision within fifteen days after examination of the engineer. One copy of the report will be transmitted to the Assistant Vice President Labor Relations, one copy to the General Chairman and one copy to the engineer.

(4) The findings and decision of the majority of this medical board as to the physical fitness of the engineer to continue in service of the carrier shall be final and binding upon the carrier, the engineer and the Brotherhood of Locomotive Engineers, but this does not mean that a change in physical condition will preclude a re-examination at a later time.

(5) The third physician selected as outlined above shall be a practitioner of recognized standing in the medical profession and a specialist in the disease or diseases from which the engineer is alleged to be suffering.

(6) Where a claim is made for reimbursement of engineer for time lost, the special medical board will, in cases where the contention of the engineer is sustained, indicate date as of which in its opinion the engineer has recovered sufficiently to resume work in his regular occupation and the engineer will be paid for time lost from that date.

(7) The carrier and the Brotherhood of Locomotive Engineers will each pay the fee and personal expenses of their respective representatives on the medical board, and will each pay one-half of the fee and personal expenses of the third member as well as one-half of all additional expense incurred by the board in connection with the examination.

Signed at Detroit, Michigan, this 24th day of March, 1965.

Accepted for the Brotherhood of Locomotive Engineers:

(Sgd.) G.E. CARPENTER
General Chairman

Accepted for The Chesapeake and Ohio Railway Company:

(Sgd.) G.M. SEATON, JR.
Asst. Vice President-Labor Relations

Approved:

(Sgd.) B.C. CORNELL
Assistant Grand Chief Engineer

ACL/ber

[DEFENDANT'S EXHIBIT
7
3-13-86 pjc]

February 3, 1984
File: 5-169-2-McCall

Mr. A.W. Gall, General Chairman
Brotherhood of Locomotive Engineers
4005 West River Drive, N.E., Box 278
Comstock Park, Michigan 49321

Dear Sir:

Reference is made to previous correspondence concerning Engineer G.W. McCall who was removed from service by the Carrier's Medical Department due to his physical condition.

As requested, a medical panel was established under the conditions set forth in Addendum 27 of the Engineers' Agreement, consisting of Dr. J.A. Thomasino, Chief Medical Officer of the Carrier, Dr. W.I. Hailer, the employee's representative, and Dr. D.C. Leach.

Dr. Leach, having examined Mr. McCall, has concluded that Mr. McCall should not be permitted to be an Engineer/Fireman while taking insulin. Dr. Leach's conclusions, therefore, are in agreement with those of Dr. Thomasino. Enclosed are two copies of Dr. Leach's report, one for your file and the other to be furnished to Mr. McCall. Dr. Leach has furnished a copy of his report to Dr. Hailer.

As the findings and decision of the majority of the Medical Board is that Mr. McCall is not physically qualified to continue in the service of the Carrier as Engineer/Fireman, the purpose of the Three Doctor Panel has been

satisfied and the procedures outlined in Addendum 27 of the Engineers' Agreement concluded.

Very truly yours,

D.T. Kelly
Director Labor Relations

Attachments - 2

bc: Mr. W.B. Vander Veer - Southfield)
Mr. G.S. Athanas - Rougemere)

G.W. McCall should not be permitted to return to service and should continue to be shown as physically unqualified.

J.A. Thomasino, M.D.
Mr. J.D. Crimmins—Copy of Dr. Leach's report is

No. 88-5

IN THE

Supreme Court of the United States

October Term, 1988

* * * * *

GERARD W. McCALL,
Petitioner,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

* * * * *

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AMERICAN DIABETES ASSOCIATION, EPILEPSY FOUNDATION OF AMERICA, MICHIGAN PROTECTION & ADVOCACY SERVICE, NATIONAL ASSOCIATION OF PROTECTION & ADVOCACY SYSTEMS, ASSOCIATION FOR CHILDREN & ADULTS WITH LEARNING DISABILITIES, NATIONAL MULTIPLE SCLEROSIS SOCIETY, PARALYZED VETERANS OF AMERICA, WORLD INSTITUTE ON DISABILITY, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, NATIONAL SPINAL CORD INJURY ASSOCIATION

* * * * *

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IN THE

SUPREME COURT OF THE UNITED STATES

GERARD W. McCALL,

Petitioner,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

NOW COME American Diabetes Association, Epilepsy Foundation of America, National Multiple Sclerosis Society, Michigan Protection and Advocacy Service, National Association of Protection and Advocacy Systems, Association for Children and Adults with Learning Disabilities, Paralyzed Veterans of America, World Institute of Disability, Disability Rights Education and Defense Fund, and National Spinal Cord Injury Association, and move this Court for leave to file a brief of Amici Curiae in the above-captioned case and in the support of this Motion say as follows:

1. The movants are organizations which have a significant interest in civil rights protection for persons with disabilities in employment and other areas.

2. The Petition for Writ of Certiorari before this Court raises significant issues regarding the

availability of State law protections against discrimination for persons with disabilities who are under collective bargaining agreements.

3. The movants, for reasons set forth in the proposed Brief of Amici Curiae, believe the Sixth Circuit's decision--which results in partial invalidation of State Civil Rights Law--is based on reasoning which is inconsistent with decisions of this Court and of other federal circuit courts of appeal.

4. The consent of the Respondent to file a brief of Amici Curiae has been sought and denied.

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Dated: July 28, 1988

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-5

GERARD W. McCALL,

Petitioner,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICI CURIAE AMERICAN DIABETES ASSOCIATION, EPILEPSY FOUNDATION OF AMERICA, MICHIGAN PROTECTION & ADVOCACY SERVICE, NATIONAL ASSOCIATION OF PROTECTION & ADVOCACY SYSTEMS, ASSOCIATION FOR CHILDREN & ADULTS WITH LEARNING DISABILITIES, NATIONAL MULTIPLE SCLEROSIS SOCIETY, PARALYZED VETERANS OF AMERICA, WORLD INSTITUTE ON DISABILITY, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, NATIONAL SPINAL CORD INJURY ASSOCIATION

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BRIEF OF AMICI CURIAE AMERICAN DIABETES ASSOCIATION, EPILEPSY FOUNDATION OF AMERICA, MICHIGAN PROTECTION & ADVOCACY SERVICE, NATIONAL ASSOCIATION OF PROTECTION & ADVOCACY SYSTEMS, ASSOCIATION FOR CHILDREN & ADULTS WITH LEARNING DISABILITIES, NATIONAL MULTIPLE SCLEROSIS SOCIETY, PARALYZED VETERANS OF AMERICA, WORLD INSTITUTE ON DISABILITY, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, NATIONAL SPINAL CORD INJURY ASSOCIATION

INTERESTS OF AMICI CURIAE

Amici curiae are ten organizations representing persons with a variety of disabilities and their families, advocates, and professionals, who are concerned that all persons with handicaps be afforded a full opportunity to participate in the work force. For many years, persons with disabilities have been unfairly denied the right to obtain employment due to misunderstanding, ignorance, and fear about their conditions and not because of inability to perform the work in question.

Amici are directly familiar with the devastating effect on persons with disabilities and their families which result from unfair denials of employment. Such denials waste valuable human talent, impede the achievement of independent living, and in many cases burden society with unnecessary expenses.

Amici have a strong interest in the outcome of this case. Amici are specifically concerned that persons who face handicap discrimination in industries subject to the Railway Labor Act--as well as industries subject to other federal labor statutes--be afforded the same range of state law remedies available to persons who face race and sex discrimination based upon their handicap.

Amici consist of:

The American Diabetes Association (ADA) has over 800 chapters and affiliates and more than 225,000 members nationwide, including physicians, research scientists, nurses, dieticians, educators, and consumers. ADA's purpose is to promote research and to improve the well-being of people with diabetes and their families. Despite the fact that more than eleven million Americans have diabetes, the condition is widely misunderstood. Inaccurate perceptions of diabetes and unfounded fears and stereotypes concerning its manifestations often give rise to employment discrimination.

The Association for Children and Adults with Learning Disabilities (ACLD) is an organization whose membership totals over 60,000 parents, professionals, and other concerned citizens dedicated to advancing opportunities for those with specific learning disabilities. It is estimated that five to ten percent of the population is affected by learning disabilities. Because specific learning disabilities are lifelong conditions, ACLD is committed to ensuring equal access to employment for persons with learning disabilities.

The Epilepsy Foundation of America is a national voluntary health agency founded in 1968 to advance the interests of the over two million Americans with epilepsy through research, vocational programs, public information and education, professional awareness, and advocacy. The term "epilepsy" evokes stereotypic images and fears which affect

persons with this medical condition in all aspects of life, especially employment. Since its inception, the Epilepsy Foundation of America has stood against the stigma and estrangement associated with epilepsy, and has supported the development of laws which protect individuals from discrimination based on stereotype and fear.

The Michigan Protection and Advocacy Service (MPAS) is a private non-profit corporation designated by the Governor of Michigan pursuant to the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. § 6001 *et seq.*) and the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (42 U.S.C. § 10801 *et seq.*) to protect and advocate for individuals with developmental disabilities and/or mental illnesses. Pursuant to this mandate, MPAS pursues a wide variety of legal and administrative remedies on behalf of persons with developmental disabilities and mental illnesses, including representation in employment discrimination cases.

The National Multiple Sclerosis Society (NMSS) is a non-profit organization which is comprised of 97 chapters with more than 400,000 members nationwide. Since it was organized in 1946, NMSS has been dedicated to promoting the cure, treatment, and prevention of multiple sclerosis (MS) and to improving the quality of life and enhancing independence for persons with MS. MS is a highly unpredictable and variable neurological disease that can result in a variety of

disabling conditions. NMSS has a long-standing interest in overcoming discrimination and prejudice that prevents people with MS and other disabilities from maintaining employment and other normal life functions that they are capable of performing despite their disabilities.

The National Association of Protection & Advocacy Systems represents Protection and Advocacy systems established pursuant to Section 113 of the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6042, and Public Law 99-319, the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 USC 10801 *et seq.* These agencies have the statutory mandate to advocate for the rights of persons identified as develop mentally disabled or mentally ill. As part of this mandate, Protection and Advocacy agencies nationwide represent people with disabilities in employment-related matters, including discrimination.

Paralyzed Veterans of America (PVA) is a federally-chartered non-profit corporation and national membership organization comprised of veterans of the U.S. Armed Forces who have suffered spinal cord injury or dysfunction, either service-connected or non-service-connected in origin. PVA has 31 chapters and 15 subchapters located throughout the nation and represents over 14,000 members. Among the goals of PVA is the elimination of barriers which restrict the ability of mobility-impaired persons to participate in or receive the benefit of employment, transportation, educa-

tion, and cultural activities.

The World Institute on Disability is a private non-profit 501(c)-(3) corporation focusing on major policy issues from the perspective of persons with disabilities. It functions as a research center and as a resource for information, training, public education, and technical assistance for persons with disabilities. One of the goals of the Institute is to ensure that persons with disabilities are protected from discrimination based on their disability in all aspects of life, including employment.

The Disability Rights Education and Defense Fund (DREDF) is a national civil rights organization dedicated to securing equal citizenship for disabled Americans. DREDF pursues its mission through education, advocacy, and litigation. DREDF has participated in other major civil rights cases before this Court either as co-counsel or as amicus, including *Consolidated Rail Corp. v. Darrone,* 465 U.S. 624 (1984). DREDF views employment as a key to the independence of disabled persons and federal and state civil rights laws as central to ensuring equal employment opportunity.

The National Spinal Cord Injury Association (NSCIA) is a national non-profit organization representing the interests of the more than 500,000 Americans who are paralyzed as a result of spinal cord injuries and diseases. Established in 1948, the NSCIA has 72 chapters nation-wide, and 30 chapters in development. Through such chapters and its na-

tional organization, the NSCIA promotes prevention programs, services, and research. The NSCIA is interested in advancing the maximum utilization of the talents and skills of persons with spinal cord injuries, thereby ensuring the highest possible quality of life for such individuals.

SUMMARY OF ARGUMENT

For a significant number of persons, the Sixth Circuit's decision invalidates State statutory expression of public policy with respect to the integration of persons with disabilities into the labor force. This invalidation results from a process of reasoning which is inconsistent with the decisions reached and rationales employed by this Court and by other federal circuits in resolving issues of federal labor law preemption. Amici contend that in light of the problematic analysis of the Sixth Circuit, the "obvious importance of even partial invalidation of a state law designed to prevent the discriminatory denial of job opportunities" merits the attention of this Court. *Colorado Anti-Discrimination Commission v. Continental Airlines,* 372 U.S. 714, 717 (1963).

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE SIXTH CIRCUIT'S DECISION RESULTS IN THE PARTIAL INVALIDATION OF STATE STATUTORY PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION AND SUCH STATE PROTECTIONS CONSTITUTE IMPORTANT VEHICLES IN ADVANCING THE PUBLIC POLICY OF ERADICATING DISCRIMINATION ON THE BASIS OF HANDICAP.

In recent years, forty-nine State have enacted statutory protections for persons with disabilities with respect to discrimination in employment and other arenas of social interaction. 45A Am.Jur.2d § 124, pp.176-77. The Michigan Handicappers' Civil Rights Act--enacted to ensure the employment of persons with handicaps to the "maximum practicable extent"--is an important part of the scheme of State protection. *Wardlow v. Great Lakes Express Co.*, 128 Mich. App. 54, 339 N.W.2d 670, 674 (Mich.Ct.App., 1983). The Sixth Circuit's decision potentially bars thousands of workers under collective bargaining agreements from asserting rights established by State anti-discrimination laws. Because of the State's strong role in advancing the policy of non-discrimination, the invalidation by the Sixth Circuit of such protection for a significant number of persons deserves scrutiny by this Court.

These State enactments are landmarks in a process of momentous change in public policy regarding persons with disa-

bilities, an evolution from isolation to integration. In the past, persons with disabilities such as mental retardation, mental illness, and epilepsy have been subjected to exclusionary immigration policies, sweeping institutionalization, and compulsory sterilization under statutes premised on the "science" of eugenics and fears of a contagion of "defective" traits in society. President's Commission on Employment of the Handicapped, "Disabled Americans: A History," 27 Performance 1, No. 5-7 (Nov.-Dec. 1976, Jan. 1977). Additionally, children with disabilities have until recent times been excluded from the public school system or simply "warehoused" in segregated classes. *Honig v. Doe*, ____ U.S. ____ (1988). Such practices have left a legacy of ingrained attitudinal prejudices against handicapped individuals, a legacy which anti-discrimination laws have been designed to help eradicate.

As this Court has found, Congress, in enacting Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, has "acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Arline v. School Board of Nassau County*, ____ U.S. ____, 107 S.C.T. 1123, 1129 (1987). In amending the statutory definition of "handicapped individual" to include persons who are regarded as having a handicap, Congress was concerned "with protecting the handicapped against discrimination stemming not only

from simple prejudice, but from 'archaic attitudes and laws.'" *Id.* at 1126 (quoting S.Rep.No. 93-1297 (1974)).

The Michigan Handicappers' Civil Rights Act (MHCRA), MCL 37.1101 *et seq.*, similarly recognized the imperative of eradicating attitudinal bias and general exclusionary practices affecting persons with disabilities. According to the legislative history of the MHCRA:

> Michigan law offers protection in most situations from discrimination based on race, color, religion, national, origin, and sex, and in some situations from discrimination based on age and marital status, [but] existing law offers handicappers (sic, less?) than for others. Traditional attitudes often work against handicapperseven though they are perfectly capable of performing the jobs for which they apply.

Carr v. General Motors Corp., 425 Mich. 313, 389 N.W.2d 686, 688 (Mich. S. Ct., 1986) quoting House Analysis, S.B. 749, July 27, 1976.

Clearly, the MHCRA does not countenance generalized assumptions or policies regarding the ability of persons with handicaps. The need for statutory prohibitions against such generalized assumptions and exclusions is compelling in light of the status of handicapped persons in the labor force.

Statistical studies have shown that unemployment rates

among handicapped persons are drastically higher than rates of unemployment for non-handicapped persons. Wolfe, "How the Disabled Fare in the Labor Market," 103 Monthly Lab. Rev. 50-51 (1980). Only a small percentage of handicapped Americans who could work if given the opportunity are actually employed. Note, "Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled," 61 Geo. L.J. 1512 (1973). In 1983, unemployment rates among handicapped workers were estimated to be between 50 and 75 percent. U.S. Commission of Civil Rights, "Accommodating the Spectrum of Individual Abilities," 81 Clearinghouse Publ. 29 (Sept., 1983). Significantly, only a small percentage of cases is inability to perform a regular, full-time job the reason a handicapped person is not employed. *Id.* Frequently, employer prejudices exclude handicapped persons from jobs. Biases operate subtly, sometimes unconsciously, to eliminate handicapped job applicants in the application, screening, testing, interviewing and medical examination processes:

> Often, the employer makes erroneous assumptions regarding the effect of a person's disability on his or her ability to perform on the job. In most cases the disabled person is never given an opportunity to disprove those assumptions; in some cases, the disabled person never knows why he or she didn't get the job.

Kaplan, "Employment Rights: History, Trends and Status," 2 Law Reform in Disability Rights E-4 (1981).

It is against this background that the rights of persons with disabilities to secure the protections of State civil rights laws must be addressed.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION OF THE SIXTH CIRCUIT IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The right of handicapped persons who work under collective bargaining agreements to access courts to enforce State civil rights statutes is grounded in prior decisions of this Court and other federal courts of appeal. Although these decisions have often been reached in cases arising under more prevalent labor legislation, these decisions are of assistance in construing the Railway Labor Act (RLA). *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

Clearly, the RLA itself contains no indication of intent to preempt State Anti-Discrimination laws. *Colorado Anti-Discrimination Commission v. Continental Airlines*, 372 U.S. 714 (1963). The Sixth Circuit distinguishes *Colorado Anti-discrimination* on the grounds that the State handicap discrimination claim involved the same inquiry as the arbitration process: the worker's ability to perform the particular job. Because the same factual inquiry was involved in the two proceedings, the Sixth Circuit reasons, the purposes of labor arbitration would be undermined by allowing the jury the opportunity to "second-guess" the findings of the arbitral panel.

Yet in cases arising under the Labor Management Relations Act, this Court has stated that the mere existence of the same matrix of facts in the two proceedings is insufficient to man-

date preemption; rather, an independent State law claim is preempted only if its resolution requires the interpretation of the collective bargaining agreement. *Lingle v. Norge Division of Magic Chef, Inc.*, ____ U.S. ____ (1988). See also *Leu v. Norfolk and Western Railway Co.*, 820 F.2d 825 (7th Cir., 1987) (State tort of conversion preempted by RLA because of existence of alleged duty to pay medical expenses dependent upon terms of the labor contract). In *Lingle* and other decisions, this Court has recognized that consideration of potential or actual interference with the arbitration process must yield to "different considerations... where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Barrentine v. Arkansas-Best Freight System Inc.*, 450 US 728, 737 (1981). *Atchison, Topeka and S. F. Ry. v. Buell*, ____ U.S. ____, 107 S.Ct. 1410 (1987). See also *Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S. 290 (1970). The approach adopted by this Court in *Lingle* successfully reconciles the need to ensure uniform treatment of labor disputes within the scope of collective bargaining agreements while protecting the integrity of independent substantive rights for individual employees. The approach adopted by the Sixth Circuit, in contrast, effectively overrules civil rights protections applied to handicapped workers under collective bargaining agreements.

Such a result might be tolerable if the RLA or the contract entered into under its authority established a substantive standard by which the judge employment claims. Not only is this not the case, but the procedure which the Sixth Circuit's decision relegates the employee is systematically incapable of making the mixed inquiries of law and fact required by State anti-discrimination laws. As this Court has stated, the "specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). Although the arbitrator may be competent to decide factual issues such as whether the employee utilized insulin to control his diabetes and whether the company policy excluded such individuals, the arbitrator lacks the competence to determine the legal issues implicated by these circumstances, issues regarding the employee's rights to be free from discriminatory actions and policies. See *Barrentine* at 743. Contrary to the Sixth Circuit, such considerations do not apply only when two federal statutes are involved. *Lingle, supra.*

It is precisely the absence of a substantive standard under the RLA and the labor contract that authorized the separate State inquiry and brings this case within the rationale of *Lingle.* In the present case, the State law has established criteria for deciding this case which enables State law to be applied without reference to the collective bargaining agreement. The issue of the employee's ability to perform the du-

ties of the job does not involve interpretation of standards set out in the collective bargaining agreement. Because substantive rights under the contract are not implicated, there is no danger of interference with the federal scheme of labor dispute resolution. As the Ninth Circuit--in holding that Oregon's handicap discrimination statute is not preempted by the Labor Management Relations Act--has stated, "[i]f a court can uphold state rights without interpreting the terms of a CBA, allowing suit based on the state rights does not undermine the purpose of Section 301 preemption: guaranteeing uniform interpretation of terms in collective bargaining agreements." *Miller v. A.T. & T. Network Systems*, ____ F.2d ____ (9th Cir., 1988).

To the extent that certain frustration does occur, such a concern is strongly mitigated by the fact that the decision of the arbitral board was admitted into evidence in the State law proceeding. See *Alexander* at 60. Given the critical importance of the non-negotiable and independent substantive rights established under civil rights statutes, such minimal frustration is tolerable. State anti-discrimination laws are simply too important and substantial to be, in effect, consumed by arbitration proceedings. This is true with regard to discrimination claims based on race, sex, age, or handicap. If an Asian-American was disqualified by a company height requirement, would an arbitration decision upholding this policy preempt the individual's right to proceed under state anti-discrimination laws? Similarly, if a woman was

disqualified by a minimum weight-lifting requirement, would her state law claim be precluded? Amici respectfully suggest that such questions answer themselves, and the Sixth Circuit's decision contains no principled basis for distinguishing such cases from instances where a person's handicapping condition is utilized as a proxy for individual ability. Such a person, no less than others, has the right to access the remedial avenues established by civil rights law, avenues which are capable of accommodating the broad and subtle inquiries required by the standards of public law.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: July 28, 1988